

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

MARK R. ROBISON,  
Appellant,

DOCKET NUMBER  
DA-3443-17-0323-I-1

v.

DEPARTMENT OF THE AIR FORCE,  
Agency.

DATE: August 30, 2023

**THIS FINAL ORDER IS NONPRECEDENTIAL<sup>1</sup>**

Alisa J. Robison, Luther, Oklahoma, for the appellant.

Captain Justin Edward Boerner, Esquire, and William David Vernon,  
Esquire, Tinker Air Force Base, Oklahoma, for the agency.

**BEFORE**

Cathy A. Harris, Vice Chairman  
Raymond A. Limon, Member

**FINAL ORDER**

¶1 The appellant has filed a petition for review of the initial decision, which dismissed the appeal of his reassignment for lack of jurisdiction. Generally, we grant petitions such as this one only in the following circumstances: the initial decision contains erroneous findings of material fact; the initial decision is based

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<sup>1</sup> A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the administrative judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)). After fully considering the filings in this appeal, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review and AFFIRM the initial decision, which is now the Board's final decision. [5 C.F.R. § 1201.113\(b\)](#).

¶2 On review, the appellant repeats his arguments that he was hired for a permanent swing shift position, and he contests his reassignment to a day shift position, which resulted in the loss of differential pay. Petition for Review (PFR) File, Tab 1 at 3. Although he acknowledges that "management has a right to reassign employees due to certain reasons such as workload," he asserts that there was no such workload justification concerning his reassignment. *Id.* at 3-4. The administrative judge properly found that the Board lacks jurisdiction over the appellant's reassignment and that his alleged loss of differential pay did not meet the statutory definition of a "reduction in pay" under [5 U.S.C. § 7512\(4\)](#). Initial Appeal File (IAF), Tab 11, Initial Decision (ID) at 3; *see Fair v. Department of Transportation*, [4 M.S.P.R. 493](#), 495-96 (1981) (finding that a loss of premium pay such as a shift differential is not an appealable adverse action); *see also* [5 C.F.R. §§ 752.401\(a\)\(4\)](#), 752.402 (defining "pay" in this context as the rate of basic pay fixed by law before any deductions and exclusive of additional pay of any kind). The appellant stated in his initial appeal that he had not filed a whistleblower reprisal complaint with the Office of Special Counsel, and he has not alleged any facts below or on review that might implicate jurisdiction over an

independent right of action appeal. IAF, Tabs 1, 6-7, 9-10; PFR File, Tabs 1, 4; *see* [5 U.S.C. §§ 1221](#), 2302(b)(8)-(9). Finally, the appellant repeats his complaints about the method by which the agency reassigned him, the agency's alleged failure to issue a Standard Form 50 effecting the reassignment, and the agency's alleged failure to address his administrative grievance. PFR File, Tab 1 at 3-4, Tab 4 at 4-5. As stated in the initial decision, to the extent that the appellant argues that the agency committed harmful procedural error or a prohibited personnel practice, such claims do not provide an independent basis for finding Board jurisdiction absent an otherwise appealable action. ID at 4; *see Wren v. Department of the Army*, [2 M.S.P.R. 1](#), 2 (1980), *aff'd*, [681 F.2d 867](#), 871-73 (D.C. Cir. 1982); *see also Penna v. U.S. Postal Service*, [118 M.S.P.R. 355](#), ¶ 13 (2012).

¶3 The appellant submits certain evidence for the first time on review, namely email correspondence concerning “dual encumbering” his current position for mission-related agency purposes, dated more than 1 month prior to his initial appeal. PFR File, Tab 4 at 10-12. He also resubmits the performance plan for the E3 Aircraft Production Flight Chief-Swing Shift position, which he previously had submitted into the record in response to the administrative judge's acknowledgment order. *Id.* at 6-9; IAF, Tab 6 at 15-18. The appellant offers no explanation why he did not previously submit the email correspondence in any of his four responses to the acknowledgment order, and he has failed to show that the correspondence he submits on review is new or material evidence. *See Russo v. Veterans Administration*, [3 M.S.P.R. 345](#), 349 (1980) (stating that the Board generally will not grant a petition for review based on “new” evidence absent a showing that it is of sufficient weight to warrant an outcome different from that of the initial decision); *Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980) (stating that, under [5 C.F.R. § 1201.115](#), the Board generally will not consider evidence submitted for the first time on review absent a showing that it was unavailable before the record was closed despite the party's due diligence).

The appellant has provided no argument or facts describing how the emails would alter the jurisdictional finding in the initial decision, and we find that they are immaterial to that threshold issue.

¶4 Accordingly, we deny the petition for review and affirm the initial decision.

### NOTICE OF APPEAL RIGHTS<sup>2</sup>

You may obtain review of this final decision. [5 U.S.C. § 7703](#)(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. [5 U.S.C. § 7703](#)(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this final decision, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

**(1) Judicial review in general.** As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date of issuance of this decision. [5 U.S.C. § 7703](#)(b)(1)(A).

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<sup>2</sup> Since the issuance of the initial decision in this matter, the Board may have updated the notice of review rights included in final decisions. As indicated in the notice, the Board cannot advise which option is most appropriate in any matter.

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, [www.cafc.uscourts.gov](http://www.cafc.uscourts.gov). Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

**(2) Judicial or EEOC review of cases involving a claim of discrimination.** This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after you receive this decision. [5 U.S.C. § 7703\(b\)\(2\)](#); *see Perry v. Merit Systems Protection Board*, [582 U.S. 420](#) (2017). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the district court no later than **30 calendar days** after your representative receives this decision. If the action involves a claim of discrimination based on

race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See [42 U.S.C. § 2000e-5\(f\)](#) and [29 U.S.C. § 794a](#).

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

[http://www.uscourts.gov/Court\\_Locator/CourtWebsites.aspx](http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx).

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. [5 U.S.C. § 7702\(b\)\(1\)](#). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days after you receive** this decision. [5 U.S.C. § 7702\(b\)\(1\)](#). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the EEOC no later than **30 calendar days after your representative receives** this decision.

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations  
Equal Employment Opportunity Commission  
P.O. Box 77960  
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations  
Equal Employment Opportunity Commission  
131 M Street, N.E.  
Suite 5SW12G  
Washington, D.C. 20507

**(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012.** This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under [5 U.S.C. § 2302\(b\)\(8\)](#) or

other protected activities listed in [5 U.S.C. § 2302\(b\)\(9\)\(A\)\(i\), \(B\), \(C\), or \(D\)](#). If so, and your judicial petition for review “raises no challenge to the Board’s disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D),” then you may file a petition for judicial review either with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.<sup>3</sup> The court of appeals must receive your petition for review within **60 days** of the date of issuance of this decision. [5 U.S.C. § 7703\(b\)\(1\)\(B\)](#).

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<sup>3</sup> The original statutory provision that provided for judicial review of certain whistleblower claims by any court of appeals of competent jurisdiction expired on December 27, 2017. The All Circuit Review Act, signed into law by the President on July 7, 2018, permanently allows appellants to file petitions for judicial review of MSPB decisions in certain whistleblower reprisal cases with the U.S. Court of Appeals for the Federal Circuit or any other circuit court of appeals of competent jurisdiction. The All Circuit Review Act is retroactive to November 26, 2017. Pub. L. No. 115-195, 132 Stat. 1510.

Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

[http://www.uscourts.gov/Court\\_Locator/CourtWebsites.aspx](http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx).

FOR THE BOARD:

/s/ for

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Jennifer Everling  
Acting Clerk of the Board

Washington, D.C.